

STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

FORMAL COMPLAINT NO. 73

HON. JAMES P. NOECKER
Judge, 45th Circuit Court
Centreville, MI 49032

Concurring in Part, Dissenting in Part

We agree with the majority in the findings of fact and conclusions of law that adopt the master's report. We recommend Respondent's removal from office as the appropriate sanction for his misconduct.

We depart from the majority's recommendation of additional sanctions in the form of actual costs and expenses incurred investigating and prosecuting the formal complaint. A Michigan judge who is facing discipline should be able to look to the constitution, the statutes and/or the court rules to determine the possible sanctions. That judge would not discover in codified form a provision that held the judge responsible for actual costs and expenses as a possible disciplinary sanction.

It is not the role of the Judicial Tenure Commission to impose sanctions; that is the exclusive power of the Supreme Court. However, that power is exercised on the recommendation of the commission. Const. 1963 Art 6, § 30. The majority admits that there is neither a specific court rule nor statutory provision for imposing costs or restitution in a judicial discipline matter. Our constitution does not provide for fines, costs or expenses as a penalty for misconduct. The Michigan Constitution provides, *inter alia*, that "**the Supreme Court may censure, suspend with or without salary, retire or remove a judge.**" 1963 Const. Art 6 §30.

Michigan's constitution provides that the Supreme Court shall make rules to implement §30 and provide rules for confidentiality and privileges. A historical review of the court rules shows that cost sanctions were never formulated in a rule.

Judicial disciplinary proceedings are neither civil nor criminal; they are *sui generis*. The former court rules, 1963 GCR 932, *et seq*, did not make any provision for costs and expenses. The Michigan Court Rules of 1985, including recent amendments, do not mention costs, attorney fees or expenses in judicial disciplinary proceedings.

MCR 1.103 provides that rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or proceeding. In Michigan, the judge has notice of the type of sanctions available by constitution and court rule. The constitution specifies sanctions as censure, suspension with or without salary, retirement or removal. The language of the court rules is identical to the constitution except in grammatical form.

MCR 9.205(B) defines the actions to which a judge is subject:

Grounds for Action. *A judge is subject to censure, suspension with or without pay, retirement, or removal. . .*

MCR 9.225 applies to the decision of the Supreme Court in disciplinary proceedings. The Supreme Court is guided by our constitution which, as noted, does not include any financial penalties other than withholding a judge's salary.

The current version of MCR 9.225 became effective January 21, 2003. It replaced the former rule of 1985, which read that the Supreme Court "may direct censure, removal, retirement, suspension *or other disciplinary action*" (emphasis added). It is significant that the rule removed the option of "other disciplinary action."

Although Michigan recognizes that judicial disciplinary proceedings are *sui generis*¹, a brief discussion about attorney grievance procedures is helpful. When adopting the 1985 court rules applicable to the Attorney Grievance Commission, the Supreme Court approved a specific court rule for the recovery of costs and actual expenses from disciplined attorneys in MCR 9.128.

It is not an oversight that costs and expenses were allowed by the Supreme Court in attorney grievance proceedings but not in judicial proceedings. The assessment of costs in attorney disciplinary proceedings has an identifiable purpose. The Attorney Grievance Commission is funded through the private funds of its members. The return of funds to the State Bar is critical to its ongoing existence. The funding of judicial discipline is included in the legislative appropriation for the Supreme Court. The Judicial Tenure Commission provides a public service as a constitutional body whose powers are derived from the state constitution.

The constitution and MCR 9.205 are clear and unambiguous. A judge in Michigan faces censure, suspension with or without pay, retirement or removal as possible sanctions. The rule comports with the plain language of the constitution which would prevent the imposition of actual costs and expenses as a penalty. If the Supreme Court wanted a court rule that included the sanction of costs and/or expenses, it would have enacted one, assuming the rule also comported with Article 6, §30 of the 1963 Michigan Constitution.

The majority opinion refers to several other state jurisdictions for persuasive authority for its position on costs. The majority relies on a 1978 decision from North Dakota, *In re Cieminski*, 270 NW2d 321 (1978), to support its position that a court rule, statute or the plain language of the constitution is not necessary to establish authority to access costs.

¹ *In re Jenkins*, 437 Mich 15, 465 NW2d 317 (1991).

This case needs to be closely analyzed. First and foremost, the case provides that costs can be imposed as a lesser sanction than removal or greater sanction than censure, and not as a blanket endorsement of costs for disciplined judges. Further, there was constitutional authority for the imposition of costs which distinguishes it from Michigan law.

The complaint in *Cieminski* was brought pursuant to the North Dakota Constitution and Rule 25 of the Judicial Qualifications Commission, which, according to the reported case, was based upon the North Dakota Century Code. The North Dakota Constitution provided:

The legislative assembly may provide for the **retirement, discipline or removal** of judges. Section 96, Art. IV (emphasis added).

“Discipline” is a broad term that could encompass any manner of sanction. Rule 25 of the Commission, entitled "Decision by the Supreme Court," directed the Supreme Court to impose censure, removal, retirement, suspension, [or] **other disciplinary action**” (emphasis added). The rules in North Dakota merely defined the reference to "discipline" in the state's constitution. There is no reference to "other discipline" in the North Dakota statute.

The respondent judge in *Cieminski* argued that the restrictive language of the statute prevented an assessment of costs. The authority existed expressly by constitution and court rule. The North Dakota rules directly reflect the mandate of the North Dakota Constitution. It is the nature of the constitutionally granted authority that differentiates North Dakota from Michigan and *In re Cieminski* from this case.

Massachusetts allows costs and fees in judicial disciplinary proceedings but has a specific statute authorizing the commission to recommend an assessment of costs and expenses. ALM GL ch. 211C of §8. Michigan lacks a similar statute.

In the matter of Anderson, 252 NW2d 592 (Minn 1977), suspension was objected to as not specifically delineated by law. The Minnesota Constitution at Article 6, §9, provided that the legislature has the power to provide for the retirement, removal or **other discipline** of a judge (emphasis added). The Michigan Constitution does not provide for “other discipline.”

The Arizona Supreme Court *In the Matter of Hon. Michael C. Nelson*, 86 P3d 374 (AZ 2004), found that costs were assessable against a judge based upon Rule 18(e) which provided that the commission may recommend other measures including the assessment of attorney fees and costs. Michigan does not have a comparable court rule.

We recognize that costs have been imposed by the Supreme Court in the past. We have also noted that this has been done without any comment or explanation by the Court. In most of the cases, the respondent either consented or failed to object to the commission’s recommendations. In the most recent of these cases, *In re Thompson*, SC 124399, we note that the respondent failed to file a petition to reject or modify the commission’s recommendation. *In re Trudel*, 468 Mich 1243 (2003), respondent’s objection to the imposition of costs was not timely. Respondent’s objection was first raised in a Motion for Reconsideration, which the Supreme Court would not consider. *In re Cooley*, 454 Mich 1215 (1997), the respondent consented to the sanctions of public censure and \$3,500 in costs. *In re Edgar*, Complaint #5, and *In re Blodget*, Complaint #6, decided the same day in 1972, costs were assessed of \$1,500 and \$1,000 respectively, without comment by the court.

The fact that something has been done in the past is not compelling if it was done by consent or waiver, or if there was insufficient authority for the sanction. To date, the Supreme Court has not announced a specific rule of law that could be applied to future disputes under the doctrine of *stare decisis*.

If the Supreme Court is persuaded by the majority's argument that the constitution allows for actual costs and expenses as part of the disciplinary action, we recommend it not be applied in the case at bar. As noted by the *Cieminski* court, "the type of costs that may be assessed should be known beforehand so a judge can reasonably anticipate what the costs of a defense to the commission charges may involve." *Cieminski* at pg. 9.

In 1997, the Michigan Supreme Court made it very clear that the Judicial Tenure Commission must articulate standards of judicial discipline before applying those standards in a particular case. The commission must "demonstrate that there is a consistently enforced system of judicial discipline in Michigan." *In re Brown*, 624 NW2d 744 (1997). Then, and only then, will the Supreme Court be in a position to give deference to the commission's recommendations for sanctions.

Respondent Noecker cannot be said to have been given notice of the standards to be applied and the type of expenses that could be assessed in this case. The imposition of costs in much lesser amounts such as \$1,000 and \$3,500 has been rare. The imposition of actual costs has been extremely rare in the history of reported cases. The commission has not set standards for the imposition of costs until today. Therefore, imposition of costs in this case, if the Supreme Court believes they are authorized by law, would violate the spirit of *In re Brown*.

If the court rules that sanctions may include costs, we suggest that the commission use the following standard to determine when to request additional costs:

Conduct involving fraud, deceit, intentional misrepresentation, or false statements to the Commission, its investigators, the Master or the Supreme Court.

Further, we recommend that the Supreme Court adopt the logic of North Dakota and Arizona that provides that if a court has the power to assess costs, it has the power to limit costs.² The rules of procedure for judicial discipline “shall be construed to preserve the integrity of the judicial system, to enhance public confidences in that system, and to protect the public, the courts, and the rights of judges who are governed by these rules in the most expeditious manner that is practicable and fair.” MCR 9.200. The purpose of discipline is to preserve the integrity of the system. *In the Matter of Hon. Michael C. Nelson*. The goal is also to deter, but it is not to punish a judge.

Actual costs, expenses and attorney fees can be extremely high. The threat of an additional monetary sanction in addition to the loss of income from suspension or removal may have a very real chilling effect upon a judge’s right to a hearing.³ The judges of this state are entitled to know not only when costs will be assessed, but what type of costs will be assessed.

“Costs” is a term of art. Actual expenses are not necessarily costs. There is no definition of “costs” as that term relates to judicial disciplinary proceedings. We recommend that the court follow the Arizona Supreme Court and utilize Michigan court rules and statutes on civil litigation taxable costs for judicial disciplinary proceedings. Judges will have notice of the sanctions provided with taxable costs as that term is defined in the Revised Judicature Act. In addition to taxable costs, the expense of the transcript for submission to the Supreme Court would be a potential assessment.⁴

We do not believe that the authority exists to recommend these sanctions, but should the court decide otherwise, it is our goal to recommend an articulated standard for applying this sanction and a predictable basis for determining the amount. No one – the commission, the

² Arizona has adopted its costs powers to be modeled after the statutory taxable costs rules of civil procedure with an exception for the hearing transcript.

³ For this stated reason, North Dakota capped costs at \$ 5,000.

⁴ Judicial disciplinary proceedings are not comparable to case evaluation wherein parties risk rejecting evaluator’s decisions so the costs as defined in MCR 2.403 are neither appropriate nor predictable.

respondent or the Supreme Court – will be operating in a vacuum when concrete rules are applied.

STATE OF MICHIGAN
JUDICIAL TENURE COMMISSION

Carole L. Chiamp, Esq.

Hon. Kathleen J. McCann

Hon. Jeanne Stempien

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